

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE**

SUTTER CENTAL VALLEY HOSPITAL
d/b/a MEMORIAL MEDICAL CENTER

and

Case 32-CA-098873

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED (CNA/NNU)

Gary M. Connaughton, Atty., with Milakshmi V. Rajapakse (on brief)
for the General Counsel.

Jatinder K. Sharma and Eric R. Ostrem, Atty., for the Respondent.

Brendan White, Atty., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. On February 21, 2013, the California Nurses Association/National Nurses United (CNA/NNU) filed an unfair labor practice charge alleging that Sutter Central Valley Hospital d/b/a Memorial Medical Center (Respondent or Medical Center) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act or NLRA) by soliciting and impliedly promising to resolve employee grievances during an organization campaign conducted by the CNA/NNU and by discriminatorily enforcing its solicitation and distribution policy against employees engaged in protected Section 7 activities.

Based on that charge the Regional Director for Region 32 of the National Labor Relations Board (Board or NLRB) issued a complaint alleging that the Medical Center violated Sections 7, 8(a)(1) and (3) when Chief Nurse Executive (CNE) Betty Lopez solicited grievances and implicitly offered to remedy those grievances at an “RN Forum”, and when Medical Center Director of Education Terry Lynch sought to restrict employees from soliciting employees and distributing literature at Respondent’s medical center educational facility. The Medical Center filed a timely answer denying the substantive allegation of the complaint.

I heard this case on August 5, 2013, at Oakland, California, at the National Labor Relations Board Region 32. On the entire record, including my observation of the demeanor of

the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent,¹ I make the following

FINDINGS OF THE FACT

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I. Jurisdiction and labor organization status

At all material times, Respondent Central Valley Hospital, d/b/a/ Memorial Medical Center (Medical Center), has been a California corporation with an office and place of business in Modesto, California. In conducting its operations during the 12 month period ending December 31, 2012, Respondent derived gross revenues in excess of \$250,000, purchased and received goods valued in excess of \$5,000, and received federal Medicaid funds in excess of \$5,000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent further admits, and I find, that the CAN/NNU is a labor organization within the meaning of Section 2(5) of the Act.

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II. The Alleged Unfair Labor Practices

A. Introduction

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As noted above, Respondent operates the Medical Center in Modesto, California, an acute-care hospital facility, and a Health Education and Conference Center (Conference Center) in Modesto, California. The Conference Center, the locus of the alleged unfair labor practices in this case, is located in the McHenry Village Shopping Center about a mile away from the hospital facility.

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The Medical Center employs approximately 900 registered nurses (RNs) under the overall direction of the CNE Lopez. The CNA/NNU commenced an organizing campaign among Respondent's registered nurses in May 2012 following a management announcement of layoffs within the nursing staff planned for 2013. Respondent maintains solicitation and distribution rules that generally permit employees to distribute literature to each other during non-work hours in non-work areas. (GC Exh. 2 and 3.).

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Twice each year Respondent conducts an RN Forum (forum). The forums are meetings conducted by the CNE designed specifically for the RNs to address clinical operational issues, to review the current state of the organization, to discuss future plans, and to provide the staff with an opportunity to have a dialogue with the nursing management. To maintain adequate staffing at the hospital during the February 2013 forums, the Medical Center scheduled three separate forum sessions. They were conducted on February 19, 22, and 25 at the Conference Center. Two to three hundred registered nurses attend each session. These sessions were held around the time the hospital experienced a sharp increase in its patient census at the height of the flu season. The events relevant to this case occurred at the February 19 forum.

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¹ The Charging Party adopted the General Counsel's brief.

B. The February 19 nurses forum

The February 19 forum included a question and answer session during which Chief Executive Officer Daryn Kumar, CNE Lopez, and two other directors of patient care services responded to questions nurses in attendance submitted in writing. One question, ostensibly submitted by an attendee, inquired about the steps Respondent was taking “to keep the Union out.” CNE Lopez responded by saying, “If there is great leadership, then the decision, hopefully, is that there is not a need for a third party representation.” She then went on to say that listening to one another could eliminate the need for a union. By way of example, Lopez recounted for the audience the action taken by her and her administrative team to investigate and rectify a nursing and tech shortage brought to her attention initially by the Emergency Room (ER) manager about a week before the Forum meeting. According to Melanie Thompson’s credible account, Lopez then added: “This is what I can do to help. This is what I can do when nurses come to me and talk to me.”

Lopez testified that she had a regular practice of “rounding” in one or two units every week since she became the CNE in October 2012 and that she maintained an open door policy to help address employee concerns.² Registered nurses Melanie Thompson and Tiffany Azevedo claimed that they rarely, if ever, saw Lopez rounding or visiting the hospital units to handle employee concerns. However, they are night shift RNs and Lopez concededly makes rounds on the night shift only about once a quarter.

C. Distributing union literature at the forum

Director of Training Terence (Terry) Lynch, who regularly works at the Conference Center, served as the coordinator for the RN forum on February 19. The forum program ended at 2 p.m. At about 2:15 p.m., the staff records clerk notified Lynch that people were distributing literature outside of the Conference Center. In fact, off-duty registered nurses Robin Cooper and Melanie Thompson started distributing union-related literature on the sidewalk near the Center’s exits shortly after the RN forum ended. Union agent Marti Smith stood nearby overseeing the distribution activity.

After receiving the report about the distribution activity, Lynch went to investigate and found Thompson and Cooper outside near the Center’s exit doors distributing literature to employees leaving the forum meeting. Lynch approached the two nurses and informed them that they were not allowed to distribute literature on hospital property. Union agent Smith immediately questioned whether they were on hospital property since they were out of the Conference Center building. Thompson added that they were on a public sidewalk. However, Lynch continued to insist that they were on Medical Center property and asserted that they needed to go about three rows into the mall parking lot to distribute literature. After Smith assured Lynch that she would take care of the matter, he turned to reenter the building. Before

² Lopez described “rounding” as the practice of “going out to the units, checking in with staff in regards to the current environment, any concerns that they may have” for the purpose of connecting with the staff, evaluating decisions that are made, observing current practices, learning of any concerns, and evaluating the need for adjustments.

he did so, he stopped and told the handbillers: “This comes from employee relations.” The employees discontinued their distribution activity at that time. At the hearing, Lynch acknowledged that he did not realize when he spoke to Thompson and Cooper that their distribution activity complied with the Medical Center’s solicitation and distribution policy.

D. Issues

1. Whether CNE Lopez interfered with employee Section 7 activity in violation of Section 8(a)(1) on February 19 by soliciting employee grievances during the course of a meeting with a large number of the Medical Center’s nurses and impliedly offering to remedy their grievances in order to thwart the Union’s organizing campaign.
2. Whether the Director of Education Lynch interfered with employee Section 7 activity in violation of Section 8(a)(1) by telling employees engaged in union handbilling outside the Conference Center on February 19 that the Medical Center had a strict policy of no solicitation on company property and that they needed to relocate themselves out into the parking lot.
3. Whether Lynch’s overall actions and statements to the handbilling employees on February 19 discriminatorily altered their terms and conditions of employment in violation of Section 8(a)(1) and (3) by applying a different no-solicitation/no-distribution policy as to them.

E. Analysis and conclusions

1. Whether Lopez unlawfully solicited grievances on February 19

Section 8(a)(1) prohibits employers from soliciting employee grievances in any way that interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. *American Red Cross Missouri-Illinois*, 347 NLRB 347, 351 (2006). An employer violates Section 8(a)(1) when it solicits grievances in the midst of a union organizing campaign and makes an express or implied promise to remedy the solicited grievances. *Manor Care of Easton, P.A., LLC*, 356 NLRB No. 39, slip op. at 19 (2010). Because an employer’s promise to correct grievances leads employees to believe that the combination of inquiry and correction makes collective action unnecessary, it interferes with employees’ choice regarding union representation. *Enjo Architectural Millwork* 340 NLRB 1340, 1353 (2003).

Recently, in *Albertson’s, Inc.*, 359 NLRB No. 147 (2013), the Board summarized its rationale for treating the solicitation of grievances during an organizing campaign as an unfair labor practice that unlawfully interferes with its employees’ right to engage in organizational activities. There the Board stated:

Settled Board precedent prohibits employers from soliciting grievances during union campaigns where the solicitation carries with it an implicit or explicit promise to remedy the grievances and “impress[es] upon employees that union representation [is] . . . [un]necessary.” *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed.Appx. 435 (6th Cir. 2006); *Traction Wholesale Center Co.*, 328 NLRB 1058, 1058–1059 (1999),

enfd. 216 F.3d 92 (D.C. Cir. 2000). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. See *Amptech*, above, 342 NLRB at 1137. The inference that the employer will remedy grievances is “particularly compelling” when the solicitation constitutes a significant deviation from the employer’s existing practice of addressing employee complaints. See *Center Service System Division*, 345 NLRB 729, 730 (2005), enfd. in relevant part 482 F.3d 425 (6th Cir. 2007); *Amptech, Inc.*, 342 NLRB at 1137.

Here, Respondent argues in its brief that the hospital has an extensive, well established means of keeping in touch with employee concerns and soliciting employee questions and feedback. Its feedback system includes a general “open door” policy, the practice of “rounding” by the nursing executives and managers, quarterly “town hall” meetings conducted by the hospital’s CEO for all employees, the monthly unit staff meetings, and the daily stand-up meetings conducted at the start of each shift.

But Lopez mentioned none of this in her response to the nurses at the February 19 forum. Instead, she detailed a recent situation where management acted to remedy a matter that would be of obvious concern to nurses, i.e., staffing a unit with sufficient personnel to handle the patient workload. In doing so, she put the emphasis on management’s willingness to remedy the nurses’ issues in order to keep the union out. Hence, I find Lopez’s statements at the February 19 forum represented an assurance to the nurses that the hospital “leadership” would remedy their workplace concerns in order to keep the union out. Such an implied promise inherently interferes with the employees’ right to select an outside agent to represent them in dealing with the management. Lopez stated that Respondent’s leadership could eliminate the need for a “third party.” Accordingly, I find Lopez’s comments violated Section 8(a)(1).

2. Whether Lynch interfered with employee handbilling on February 19

The right to self-organization guaranteed by Section 7 of the Act includes the right to communicate with one another regarding self organization at work. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). The right to so communicate with one another encompasses the right to distribute union literature. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572-74 (1978). An employer is required to permit employees to distribute union literature in nonworking areas during non working time, unless the employer can demonstrate that prohibiting such activity is necessary to maintain productivity or discipline. *New York New York, LLC*, 356 NLRB No. 119, slip op. at 7 (2011). Absent a justification related to productivity or discipline, an employer’s restrictions on distribution in nonworking areas, on non working time, violate Section 8(a)(1). *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492-93 (1978).

Here, Lynch’s uninformed assertion that Thompson and Cooper could not distribute literature immediately outside the Conference Center on February 19 while both were off duty and in a nonwork area (on a public sidewalk outside the Center) brought their distribution activities to a halt on that occasion. Respondent concedes that Lynch misinterpreted its policy on solicitation and distribution on this occasion. For this reason, and as Lynch did not confiscate the literature, or threaten the employees with discipline or enforcement, Respondent argues his conduct did not violate Section 8(a)(1) but, if so, the violation was de minimis and should be

dismissed. Respondent makes no assertion that Lynch's conduct was justified by any production need or by any need for organizational discipline.

Respondent's contentions lack merit. In determining whether an employer violates Section 8(a)(1), the proper evaluation asks whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce employees engaged in union or protected concerted activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010). As is evident, Lynch's conduct served to disrupt lawful employee activity at a critical moment that day, i.e., at the very time the Union and its employee supporters had an opportunity to lawfully access nearly 300 of the nurses it seeks to organize in order to provide them with information about the Union. This is no minor matter. Accordingly, I find that his interference with the Union's distribution of literature on February 19, whether done by mistake or not, violated Section 8(a)(1).

3. Whether Lynch changed the handbillers terms and conditions of employment

The General Counsel also claims that Respondent violated Section 8(a)(1) and (3) by Lynch's conduct on February 19 by discriminatorily altering the terms and conditions of employment of Cooper and Thompson in that they were subjected to a different solicitation/distribution policy (presumably one Lynch concocted in his head) than other employees.

As found above, Lynch unquestionably disrupted the distribution activities of these two employees on February 19. But there is no evidence that Lynch possessed some type of plenary authority to unilaterally alter the terms and conditions of Respondent's employees, let alone the Medical Center's RNs. Nor is there any evidence that his conduct that day resulted in the issuance of any kind of demerit against Cooper or Thompson that Respondent recorded against these two nurses anywhere that would warrant the kind of expungement order the General Counsel seeks as a remedy. In short, based on the record in this case, I find this allegation amounts to little more than prosecutorial overkill. Accordingly, I recommend dismissal of this 8(a)(3) allegation.

Conclusions of Law

1. By soliciting employee grievances during a union organizational campaign and impliedly offering to resolve them, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By telling employees engaged in union solicitation and distribution on its property that complied with its published policy concerning solicitation and distribution that they were not permitted to do so, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. The General Counsel failed to prove that Respondent violated Section 8(a)(3) as alleged.

Remedy

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and required to post the notice to employees attached as Appendix A.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Sutter Central Valley Hospital d/b/a Memorial Medical Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Soliciting employee grievances during a union organizational campaign with an implied offer to remedy them.

b. Telling employees engaged in union solicitation and distribution on its property that complied with its published policy that they were not permitted to do so.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days after service by the Region, post at its facilities in Modesto, California, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

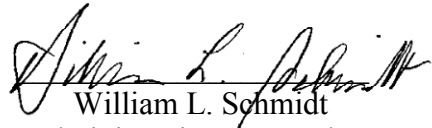
⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 19, 2012.

b. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 25, 2013


William L. Schmidt
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT solicit employee grievances during a union organizational campaign in a manner that explicitly or implicitly promises to remedy those grievances.

WE WILL NOT tell our employees that they are not permitted to engage in union solicitation on behalf of the California Nurses Association/National Nurses United (CNA/NNU) or distribute literature on behalf of the CNA/NNU at times and places that comply with our written policy concerning solicitation and distribution.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in their exercise of the rights guaranteed them by Section 7 of the Act.

Sutter Central Valley Hospital
d/b/a Memorial Medical Center

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1301 Clay Street, Federal Building, Room 300N
Oakland, California 94612-5211
Hours: 8:30 a.m. to 5 p.m.
510-637-3300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3270.